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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA



DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIK RAMIREZ-RODRIGUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 08-CV-1374 BEN
(Relates to 08-CR-748)

ORDER DENYING MOTION FOR
TIME REDUCTION UNDER 28
U.S.C. 2255 AND DENYING
MOTION TO DISMISS

[Docket Nos. 38, 58]

Before this Court is Defendant/Petitioner Erik Ramirez-Rodriguez ("Petitioner's") Motion for Time Reduction by an Inmate in Federal Custody pursuant to 28 U.S.C. § 2255. (Docket No. 38.) Petitioner's Motion is made on the grounds that Petitioner has two children and a wife who are waiting for him. Also before this Court is Respondent's Motion to Dismiss Petitioner's 2255 Motion on the grounds that Petitioner was released from custody on March 31, 2009. (Docket No. 58.) For the reasons set forth below, the Court **DENIES** both motions.

RELEVANT BACKGROUND

On February 28, 2008, Petitioner drove across the Mexico border, into California. Petitioner had a prior felony conviction from April 14, 1999 for the sale/transportation of cocaine base.

On March 13, 2008, the United States filed an Information charging Petitioner with one count of illegal re-entry under 21 U.S.C. §§ 1326(a) and (b). (Docket No. 9.)

On April 15, 2008, Petitioner pled guilty to the Information before Magistrate Judge Cathy Ann Bencivengo. (Docket No. 17.) The Magistrate Judge advised Petitioner that the maximum prison term

1 in his case was twenty years. (Opp., Ex. C at 9:12-18.)

2 On May 19, 2008, this Court accepted Petitioner's guilty plea and, based thereon, imposed a
 3 prison term of 15 months followed by supervised release for 3 years. (Docket No. 31.)

4 On July 28, 2008 Petitioner filed the Motion currently before this Court. (Docket No. 38.)
 5 Respondent filed a Response and Opposition (Docket No. 47); Petitioner did not file a reply.

6 On July 6, 2010, Respondent filed a Motion to Dismiss Petitioner's 2255 Motion. (Docket No.
 7 58.) Respondent's motion was made on the grounds that Petitioner was released from custody on
 8 March 31, 2009. *Id.*

9 For the reasons set forth below, the Court **DENIES** Petitioner's Motion to Reduce or Vacate
 10 Sentence. The Court also **DENIES** Respondent's Motion to Dismiss.

11 DECISION

12 I. PETITIONER WAIVED HIS RIGHT TO CHALLENGE HIS SENTENCE

13 Petitioner's plea agreement includes a waiver providing, in relevant part,

14 . . . defendant waives, to the full extent of the law, any right to appeal
 15 or to collaterally attack the guilty plea, conviction and sentence,
 16 including any restitution order, unless the Court imposes a custodial
 sentence above the greater of the high end of the guideline range
 recommended by the Government. . . or the statutory mandatory
 minimum term, if applicable.

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 18 (Opp., Ex. B at pgs. 3-4.)

19 The Ninth Circuit regularly enforces knowing and voluntary waivers in criminal cases where
 20 the waivers are part of negotiated guilty pleas. *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir.
 21 2000). "The sole test of a waiver's validity is whether it was made knowingly and voluntarily." *Id.*
 22 at 1068 (citing *United States v. Michlin*, 34 F.3d 896, 898 (9th Cir. 1994)). When a waiver is a term
 23 of the plea agreement and the defendant states he understands the agreement, he has knowingly and
 24 voluntarily waived his right to appeal. *Michlin*, 34 F.3d at 898-99.

25 The plea agreement's language in this case clearly embraces a waiver of any collateral attack
 26 on the imposed sentence, including a Section 2255 motion. See *United States v. Schuman*, 127 F.3d
 27 815, 817 (9th Cir.1997) (per curiam). The record reflects that Petitioner's waiver was knowing and
 28 voluntary, as evidenced by his initials on each page of the plea agreement and signature at the end of

1 the agreement. (Opp., Ex. B.) Additionally, when entering the plea before the Magistrate Judge,
 2 Petitioner verified his signature and initials on the plea (Opp., Ex. C at 4:24-5:6) and represented that
 3 he fully understood the agreement, including the waiver (*Id.* at 6:2-8 and 13:15-14:1). The Court
 4 found that there was a factual basis supporting the plea, and that the plea was knowingly and
 5 voluntarily made. (Docket No. 22.) Therefore, the Court finds that Petitioner's waiver was made
 6 knowingly and voluntarily and, thus, is valid.

7 In light of the above, the Court finds that, pursuant to the plea agreement, Petitioner waived
 8 his right to challenge his sentence. Accordingly, Petitioner's Section 2255 Motion is **DENIED**.

9 **II. RESPONDENT HAS NOT SHOWN HOW PETITIONER'S RELEASE MOOTS
 10 THE SECTION 2255 MOTION**

11 As noted, Petitioner was sentenced to 15 months in custody and 3 years of supervised release.
 12 (Docket No. 31; see also Opp., Ex. D at 4:3-8.) Respondent alleges Petitioner was released from
 13 custody on March 31, 2009. (Mot., pg. 2.) Even if true, however, Respondent has not shown how
 14 such release moots Petitioner's Section 2255 motion, especially in light of Petitioner's supervised
 15 release for 3 years, violation of which may send Petitioner back into custody. (Opp., Ex. D at 4:3-5:8)
 16 Additionally, Petitioner's sentence in this case may impact Petitioner's probation relating to his prior
 17 felony conviction. (Opp., Ex. D at 3:14-19.) Accordingly, the Court finds it may still provide
 18 meaningful relief and, as such, finds Petitioner's Section 2255 motion is not moot. *Serrato v. Clark*,
 19 486 F.3d 560, 565 (9th Cir. 2007) (appeal not moot despite intervening release because court could
 20 reduce period of supervised release). Respondent has not set forth any other grounds for dismissal of
 21 Petitioner's motion.

22 Respondent's Motion to Dismiss Petitioner's 2255 Motion is **DENIED**.

23 **CONCLUSION**

24 For the above stated reasons, the Court **DENIES** Petitioner's Motion for Time Reduction by
 25 an Inmate in Federal Custody pursuant to 28 U.S.C. § 2255 (Docket No. 38) and **DENIES**

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1 Respondent's Motion to Dismiss Petitioner's 2255 Motion (Docket No. 58).

2 **IT IS SO ORDERED.**

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4 DATED: 7/27, 2010

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Honorable Roger T. Benitez
Judge United States District Court